

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

IN THE MATTER OF:

MATRIX ENERGY, LLC
FOR DETERMINATION OF
RETAIL ELECTRIC SUPPLIER

CASE NO. 2003-00228

**RESPONSE OF KENTUCKY POWER COMPANY D/B/A
AMERICAN ELECTRIC POWER
TO MOTION TO DISMISS**

Kentucky Power Company d/b/a American Electric Power ("Kentucky Power") for its Response to Big Sandy Rural Electric Cooperative Corporation's ("Big Sandy") Motion to Dismiss states:

Introduction

Big Sandy's motion to dismiss Matrix Energy, LLC's ("Matrix") Application is premised upon two grounds. First, it argues that as a customer Matrix lacks any right to seek a determination under KRS 278.018(1) that Kentucky Power is authorized to serve the Matrix Mine, 75% of which lies in Kentucky Power's service territory. Big Sandy also argues that Matrix lacks an interest in the proposed mine and thus is not the real party in interest. Both arguments are without merit and the Commission should deny Big Sandy's motion.¹

¹ Big Sandy combined its arguments in support of its motion to dismiss with its brief on the merits. Kentucky Power's brief on the merits is being filed simultaneously with this memorandum but in a separate document.

A. Commission Precedent And Chapter 278 Of The Kentucky Revised Statutes Clearly Permit A Customer To File An Application Pursuant To KRS 278.018(1).

Big Sandy's argument that only utilities may enforce the provisions of Kentucky's certified territory statutes is without basis in the statutes or precedent. Certainly nothing in Chapter 278 so provides, or even hints at such a limitation.

Big Sandy instead pins its hopes to two of the six purposes set out in KRS 278.016 for the certified territory laws. Thus, while accurately noting that the purposes of the certified territory statutes include "encourag[ing] the orderly development of retail electric service" and "minimizing disputes between retail electric suppliers," it ignores the other four goals. Yet, avoiding wasteful duplication and unnecessarily encumbering the landscape of the Commonwealth, preventing the waste of materials and natural resources and the promotion of the "**public convenience and necessity**,"² the four purposes Big Sandy simply ignores, each implicate important customer concerns. After all, it is the customer, not the utility, who principally bears the cost of waste and duplication, and suffers the consequences of actions contrary to the public convenience and necessity. Moreover, customers have an interest that is at least equal to that of retail electric suppliers in the orderly development of retail electric service.

Any doubt, however, is dispelled by the final goal, and in particular that portion excised by Big Sandy. Specifically, while noting one of the purposes of the statutes is to minimize disputes between retail electric suppliers, Big Sandy omits the language immediately following:

and to minimize disputes between retail electric suppliers
which may result in inconvenience, diminished

² KRS 278.016 (emphasis supplied).

efficiency and higher costs in serving the consumer, the state [shall] be divided into geographical areas

KRS 278.016 (emphasis supplied). As the emphasized language makes clear, it is the customers' interests, not those of the adjacent utilities, the General Assembly sought to protect in enacting the certified territory statutes.

Big Sandy's position also is contrary to precedent. Although the Commission does not appear to have addressed the issue head on, it has permitted customers to initiate proceedings under KRS 278.018(1). See, e.g., *Order to Satisfy or Answer Bluegrass Development Company v. Kentucky Utilities Company and Owen Electric Cooperative, Inc.*, Case No. 95-061 (Ky. P.S.C. March 3, 1995); *Order to Satisfy or Answer, Michael and Carol Conover v. Inter-County Rural Electric Cooperative Corporation and Kentucky Utilities Company*, Case No. 90-232 (Ky. P.S.C. August 15, 1990); *Order, In the Matter of The Application of Richwood Industrial Development Corporation For Electric Service From The Union Light, Heat and Power Company*, Case No. 9203 (Ky. P.S.C. August 7, 1985); *Order, In the Matter of: Petition By Commonwealth of Kentucky, The Campbell County Fiscal Court For Determination That Respondent Union Light, Heat and Power Company May Service Industrial Park*, Case No. 8541 (Ky. P.S.C. August 26, 1982) (granting non-utility petitioner's application). Indeed, the petition that gave rise to the court of appeals decision in *Owen County Rural Electric Cooperative Corporation v. Public Service Commission*, Ky. App., 689 S.W.2d 599, 600 (1985) was initiated by the owner of the industrial park at issue.

Finally, although the Commission is not bound by the rules of civil procedure, it has found them instructive. See, e.g., *Newman v. Salt River Rural Electric Cooperative Corp.*, Case No. 90-088 (Ky. P.S.C. June 28, 1990); *Louisville Gas and Electric*

Company, Case No. 96-246 (Oct. 15, 1996). Under the civil rules, lack of capacity is an affirmative defense that is waived unless raised early in the proceedings. See, e.g., *F.D.I.C. v. Calhoun*, 34 F.3d 1291, 1299 (11th Cir. 1994) ("Defenses objecting to lack of capacity that are not raised are waived.") Here, for whatever reason, Big Sandy failed to raise Matrix' alleged lack of capacity in its Response. In fact, Big Sandy delayed until after two rounds of data requests and a day long hearing to raise the issue. Thus, even if the argument were otherwise meritorious, and it is not, the Commission should refuse to consider it at this late hour.

B. Matrix Is The Real Party In Interest In This Proceeding.

Big Sandy's argument that Czar, not Matrix, is the real party in interest is meritless. In fact, it appears to be based upon a studied indifference to the nature of the relationship between Matrix, Czar Coal Corporation ("Czar") and Beech Fork Processing, Inc. ("Beech Fork"), the evidence of record and the terms of Matrix' contract as well as Kentucky law.

Matrix, which is under contract to perform the mining at issue, Czar, which leases the coal to be mined and owns the Pevler Substation, and Beech Fork, which provided the initial work on developing the mine, are affiliated companies owned by the same individuals. Prefiled Testimony of Paul Horn at 1-2 ("Horn"). Mr. Horn, although employed by Beech Fork, performs a variety of services for both Beech Fork affiliates Czar and Matrix, including:

overseeing the operation of the mine, ***including the manner in which power is supplied to the mine site***. I am also involved in planning how the mining is to be performed, obtaining the proper permits and ensuring the payment of royalties. I perform these duties for Beech Fork and for its

affiliated companies, such as Matrix Energy, LLC ... and Czar Coal Corporation....

Id. (emphasis supplied). Likewise, Mr. Horn testified unequivocally at the hearing about plans to provide power to the mine through the Pevler Substation:

Q. Since the submittal of your prefiled testimony, Mr. Horn, has another option for service by Kentucky Power become available or known to you and, if so, what is that option?

A. Yes, sir. Once looking at the situation, the Pevler Station, which also is referred to as the Czar Station on the mapping, which is a currently owned infrastructure of Czar which is powered by AEP, we believe we could use that existing infrastructure, use the existing tap, the existing high side metering, and set a new transformer and take 34.5 [kV] to the Matrix mine site and tie into [the] existing line that we have in place going to Matrix.

Transcript of Hearing ("T.H.") at 9-10.

Mr. Horn's testimony puts to rest both Big Sandy's contention no one testified on behalf of Czar, and its equally erroneous contention "[t]here is no evidence that 'Czar' has consented to its distribution facilities to be used to serve the 'Matrix' mine."

Memorandum Brief of Big Sandy Rural Electric Cooperative Corporation ("Big Sandy Memorandum") at 10. Mr. Horn, whose duties include responsibility for the power supply for both Czar and Matrix mines, not only testified, but detailed the plans for using the Pevler Substation to supply power to the Matrix Mine. Horn at 1-2; T.H. at 10, 12, 34-35. In any event, no clearer evidence of Czar's consent is possible than the use of the Pevler Station since October-November, 2002 to provide temporary power to the mine. T.H. at 12-13.

Big Sandy's argument that Czar not Matrix will be the customer, and hence not the real party in interest, also is without record support. As Mr. Horn explained in response to Big Sandy's cross-examination:

Q. Well, you know, the question is who's responsible for paying the power bill?

A. It would depend on the situation that we get power at from these proceedings. If a new tap is proposed and Matrix does that tap, then Matrix would be. If we use the Pevler Station, then Czar would be.

Q. Responsible for paying the bill?

A. They would pay the end bill to AEP.

Q. But they would be responsible for paying the electric bill under those circumstances?

A. Matrix would probably pay their portion of the power bill and then Czar would pass that on to AEP if we were at the Pevler Station.

T.H. at 31-32. Thus, whether power is taken from the proposed EKPC tap of the Dewey-Inez 69 kV line or the Pevler Substation, Matrix will be bear the cost. Big Sandy errs in arguing to the contrary.

Third, Big Sandy's suggestion that Matrix' contract to mine the Alama reserves has expired is simply wrong. See, Big Sandy Memorandum at 7-8. Thus, while arguing "the contract by its own terms has expired," Big Sandy is careful not to quote the actual language of the contract. It provides:

The initial term of this contract shall be for a period of not more than one year from the date hereof and, if not sooner terminated, the term of this contract shall thereafter be automatically extended for successive periods of one (1) year to the exhaustion of the mineable and merchantable

coal unless otherwise terminated as hereinafter set forth in this contract.³

Not only is the contract automatically extended for successive one year periods, but contrary to Big Sandy's inaccurate representation, the extension is premised upon the existence of the coal reserves⁴ and not ongoing mining activity. See, Big Sandy Memorandum at 7. The contract, like Mr. Horn's testimony, makes clear that Matrix will operate the mine and continues to enjoy the right to do so. See, Horn at 2-3.

Big Sandy's erroneous contention that Matrix' mining contract has expired is part and parcel of its larger argument that Matrix is "a text-book 'shell' corporation." Big Sandy Memorandum at 11. As initial matter, the relevance of this argument to this proceeding – as opposed to whatever credit arrangements Matrix' retail electric supplier might wish to make with it – is far from evident. Indeed, Big Sandy's insistence that Matrix is a shell corporation stands in marked contrast to Big Sandy's hyperbolic efforts to obtain Matrix – the self-same alleged "shell corporation" – as a retail customer. More fundamentally, there is no dispute that Matrix is a duly organized limited liability company, authorized to transact business in the Commonwealth and to mine the Alma reserves under contract with Czar.⁵ Big Sandy does not and can not point to any provision of Chapter 278 of the Kentucky Revised Statutes, or otherwise, that makes such an arrangement illegal or renders Matrix ineligible to receive electric service from Kentucky Power. In any event, under Kentucky law, Matrix possesses a significant enough interest to maintain this action as

³ Matrix Response to Big Sandy Data Request 2, Tab 2 at 2.

⁴ *Id.*

⁵ Matrix Response to Big Sandy Data Request 1, Tab 1; Matrix Response to Big Sandy Data Request 2, Tab 2.

a real party in interest. See, *Kentucky Center for the Arts v. Whittenberg Engineering & Construction Company*, Ky. App., 746 S.W.2d 71, 73 (1987) (Kentucky Center for the Arts possessed a “significant interest under facts” of the case and thus was real party in interest even though it lacked legal title or interest in construction project and was not a party to contract allegedly breached.)

Fourth, Big Sandy has not and can not reasonably contend it has in any way been prejudiced by Czar’s nominal absence from this proceeding. Moreover, to the extent Czar’s presence is required, and clearly it is not, it should be permitted to intervene. By asking the Commission to dismiss the application at this late date, thereby further delaying commencement of operations, and giving rise to the consequent loss of jobs, taxes and severance dollars, Big Sandy’s actions raise reasonable questions about whether it is ready, willing and able to serve the Matrix Mine, or even whether it is seeking to advance its narrow pecuniary interests at the expense of its possible customer.

Finally, as with Big Sandy’s argument that Matrix lacks standing, Big Sandy has waived its real party in interest defense, even if it were valid, by delaying until after the hearing to raise it. See, e.g., *United Healthcare Corp. v. American Trade Insurance Company*, 88 F.3d 563, 569 (8th Cir. 1996) (real party in interest objection waived when not raised until one week before trial); *Sun Refining & Marketing. Company v. Goldstein Oil Company*, 801 F.2d 343, 344-45 (8th Cir. 1986) (real party in interest objection waived when not raised until after trial); *Hefley v. Jones*, 687 F.2d 1383, 1387-88 (10th Cir. 1982); *Harris v. Illinois-California Express, Inc.*, 687 F.2d 1361, 1373-74 (10th Cir. 1982) (real party in interest defense waived when not asserted until shortly before trial).

Conclusion

For the reasons set forth hereinabove, Kentucky Power Company d/b/a respectfully requests that Big Sandy Rural Electric Cooperative Corporation's Motion to Dismiss be denied.

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Mark R. Overstreet
STITES & HARBISON PLLC
421 West Main Street
P.O. Box 634
Frankfort, KY 40602-0634
Telephone: (502) 223-3477

COUNSEL FOR RESPONDENT, KENTUCKY
POWER COMPANY D/B/A AMERICAN
ELECTRIC POWER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by United States First Class Mail, postage prepaid, on this 23rd day of December, 2003 upon:

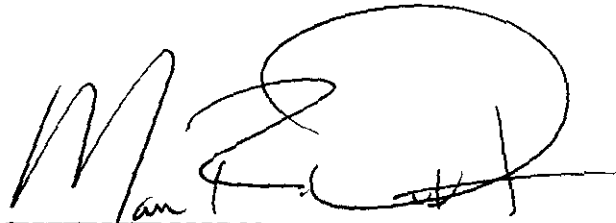
Rebecca S. Gohmann
Matrix Energy, LLC
107 Dennis Drive
Lexington, Kentucky 40503

Albert A. Burchett
P.O. Box 0346
Prestonsburg, Kentucky 41653

J. Scott Preston
308 Main Street
Paintsville, Kentucky 41240

Robert C. Moore
HAZELRIGG & COX, LLP
P.O. Box 676
Frankfort, Kentucky 40602-0615

Richard G. Raff
Public Service Commission of
Kentucky
211 Sower Boulevard
Frankfort, Kentucky 40601

A handwritten signature in black ink, appearing to read 'Mark R. Overstreet', written over a horizontal line.

Mark R. Overstreet